South Johor Securities Sdn Bhd v Alexander Codsi

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–566 OF 2002
KANG HWEE GEE J
12 FEBRUARY 2007

Civil Procedure — Writ of summons — Extension of writ — Writ 'may be extended twice' — Whether writ maybe extended seven times — Whether Defendant unfairly deprived of defence of limitation — Rules of the High Court 1980 O 6 r 7(2) and (2A)

Civil Procedure — Writ of Summons — Service — Personal service — Rules of personal service — Writ served by registered post in the UK under UK Rules of service — Whether such service valid

Civil Procedure — Writ of Summons — Service — Service out of jurisdiction — Notice of writ served — Whether writ needs to be served — Whether service valid

The plaintiff claimed against the defendant for monies arising from trading in securities, where the plaintiff had allegedly acted as the defendant's sharebroker. In March 2001 the plaintiff filed an application, heard in Dagang 7 of the Kuala Lumpur High Court, for leave to issue and serve these proceedings against the defendant out of the jurisdiction. In April 2001 leave was granted as prayed. The writ was filed, registered and issued out of Dagang 8. Attempts to serve the writ on the defendant personally in England and the United Arab Emirates were not fruitful. In October 2004, and then in April 2005, the plaintiff obtained separate orders for substituted service from Dagang 7 and Dagang 8 respectively. In April 2006 the plaintiff obtained an order to amend the order for substituted service from Dagang 8 and thereafter substituted service of the notice of the writ of summons was effected in Malaysia and the United Kingdom by advertisement and posting pursuant to the orders, as amended. In the meantime, in October 2005, the notice of the writ and the statement of claim were delivered by first class registered post to the defendant in England, in compliance with the local Civil Procedure Code. The defendant alleged that the writ ought not to have been repeatedly extended, a total of some seven times, thereby unfairly depriving him of the right to plead limitation. Further, leave to issue a proposed writ had been granted in Dagang 7 but no writ was filed in Dagang 7. Instead a writ was filed in Dagang 8 where no leave had been properly sought nor obtained. Also, leave for substituted service had been obtained from Dagang 7 when leave for substituted service had been sought from Dagang 8. Even if the leave obtained was regular, the defendant merely had notice of the writ only by way of advertisement. The writ itself had never been properly served on the defendant. The Senior Assistant Registrar allowed the defendant's application to set aside the service of the writ. The plaintiff appealed.

Held, allowing the appeal, with costs:

(1) The issuance of a writ and its subsequent extension is a function of the Registrar. The amended O 6 r 7(2) of the Rules of the High Court 1980 ('the RHC'), which provides that a writ may be extended twice does not prohibit a Registrar from extending the writ more than twice where the justice of the case requires. The use of the word 'may' shows the it is intended to provide some restrictions on the Registrar's discretion, but not to the extent of fettering him, where the circumstances justify it, from ordering extensions more than twice. Where, as here, the Registrar acts within the law and the RHC in the exercise of his discretion to extend a writ, it is incompetent for a defendant to challenge his decision. The defendant may only challenge the legality of the issuance of the writ (see paras 14, 15, 16).

(2) While a writ should not generally be allowed to be extended so as to deprive a defendant of a defence of time bar, this applies only to those cases where a plaintiff sits on his right to commence an action against a defendant who can be promptly served. It does not fetter a discretion to grant extensions where, as here, the defendant resides outside the jurisdiction and difficulties are encountered in attempts at service. To refuse an extension in such a case would allow the defendant to stay out of jurisdiction and take advantage of the statute of limitation — an obvious injustice to the plaintiff. Here, the defendant was not within jurisdiction, attempts had been made to serve the writ and the defendant had been evading service (see paras 17, 18).

(3) The plaintiff had sought leave by way of originating summons which was heard in Dagang 7. The plaintiff then filed the writ which was issued out of Dagang 8. A plaintiff has no control over which court is allotted the suit and the writ. The writ, issued out of the High Court registry, and allotted to Dagang 8, on the strength of the prior leave obtained in Dagang 7, was properly issued (see paras 21–24).

(4) The plaintiff's service by substituted service was fraught with irregularities. The order to serve out of jurisdiction was obtained from the Dagang 8 court in August 2002 when leave had already been obtained from the Dagang 7 court in March 2001. The request by the plaintiff seeking assistance to have the writ served on the defendant was indeed based on the second leave obtained from Dagang 8, and enclosing therewith sealed copies of notice of writ to be served out of jurisdiction dated 21 August 2002 and the extended writ of summons dated 16 April 2002 both based on the second leave (see para 31).

(5) The 'command' from a writ issued out of our High Court does not extend to other jurisdictions. To serve the writ out of jurisdiction would be an encroachment on the sovereignty of that territory. Hence only a notice of the writ and not the writ itself needs to be served on a defendant outside the jurisdiction. The objective of serving a notice of the writ is to bring to to the defendant's notice the plaintiff's action against him in this jurisdiction. A notice may therefore be effected by any means subject only to the rules of the RHC (see paras 25–28).

(6) A notice of the writ need not be served by personal service on the defendant provided it is served on him in accordance with the law of the country in which

service is effected. The plaintiff here also relied on the personal service. Having been granted leave to serve the notice of the writ, the plaintiff need obtain no further order from the court for the service to be effective. The plaintiff merely needs to comply with the relevant local rules for service with respect to the service of a notice (see paras 32–34).

[Bahasa Malaysia summary

Plaintif telah menuntut daripada defendan untuk sejumlah wang berikutan perniagaan sekuriti, di mana plaintif bertindak sebagai broker saham defendan. Dalam bulan Mac 2001 plaintif telah memfailkan satu permohonan, yang didengar di Dagang 7 Mahkamah Tinggi Kuala Lumpur, untuk satu kebenaran mengeluarkan dan menyerahkan prosiding-prosiding ini terhadap defendan diluar bidangkuasa. Pada April 2001 kebenaran telah diberikan seperti dipohon. Writ telah difailkan, didaftarkan dan dikeluarkan oleh Dagang 8. Percubaan-percubaan untuk menyerahkan writ secara kediri kepada defendan di England dan Emiriah Arab Bersatu tidak berhasil. Dalam bulan Oktober 2004, dan kemudiannya pada bulan April 2005, plaintif telah mendapatkan perintah berasingan untuk penyampaian ganti masing-masing daripada Dagang 7 dan Dagang 8. Pada bulan April 2006, plaintif telah mendapatkan perintah bagi meminda perintah penyampaian ganti daripada Dagang 8 dan selepas itu penyampaian ganti untuk notis writ saman di Malaysia dan United Kingdom melalui pengiklanan dan penampalan menurut perintah-perintah tersebut, sebagaimana pindaan. Pada masa yang sama, dalam bulan Oktober 2005, notis writ dan pernyataan tuntutan telah dihantarserah melalui pos berdaftar kelas pertama kepada defendan di England, menepati kehendak Kanun Prosedur Sivil tempatan. Defendan menyatakan bahawa writ tersebut tidak perlu dilanjutkan beberapa kali, iaitu bersamaan dengan 7 kali, dengan itu tidak adil dan menghalangn haknya untuk memplidkan batasan had masa. Selanjutnya, kebenaran untuk mengeluarkan writ diberikan oleh Dagang 7 tetapi tiada writ yang difailkan di Dagang 7. Sebaliknya, writ telah difailkan di Dagang 8 dimana sebenarnya tiada kebenaran yang dipohon ataupun diberikan. Juga, kebenaran untuk penyampaian ganti telah diberikan oleh Dagang 7 bila kebenaran untuk penyampaian ganti telah diberikan di Dagang 8. Walaupun jika kebenaran diperolehi secara teratur, defendan hanya mempunyai pengetahuan berkenaan writ melalui pengiklanan. Writ itu sendiri tidak pernah diserahkan secara teratur kepada defendan. Penolong Kanan Pendaftar membenarkan permohonan defendan untuk mengenepikan penyampaian writ. Plaintif merayu.

Diputuskan, membenarkan rayuan, dengan kos:

(1) Pengeluaran writ dan perlanjutan berikutnya adalah di bawah fungsi seseorang pendaftar. Pindaan A 6 kaedah 7 (2) KMT, yang menyediakan bahawa writ boleh dilanjutkan dua kali tidak melarang pendaftar dari melanjutkan writ lebih daripada dua kali apabila keadilan kes memerlukannya. Penggunaan perkataan 'mungkin' menunjukkan bahawa ia meniatkan kepada menyediakan sesuatu sekatan-sekatan ke atas budi bicara pendaftar, tetapi tidak ke tahap membelenggunya, bila keadaan-keadaan membenarkannya, dari memerintahkan lanjutan lebih daripada dua kali. Disini, pendaftar bertindak

berdasarkan kepada perundangan dan juga KMT dalam menggunakan budi bicaranya untuk melanjutkan writ, Defendan tidak berkemampuan untuk mencabar keputusannya. Defendan mungkin hanya mampu mencabar kesahan writ tersebut.

(2) Walaupun writ pada kebiasaannya tidak sepatutnya dibenarkan untuk dilanjutkan ditakuti kalau-kalau ia akan menghalang defendan dari menggunakan pembelaan had masa, ini hanya terpakai kepada kes-kes dimana plaintif mempunyai hak memulakan tindakan terhadap defendan yang mana penyerahan boleh dilakukan dengan segera. Ia tidak akan membelenggu budi bicara untuk memberikan perlanjutan dimana, disini, defendan tinggal di luar bidang kuasa dan kesusahan dihadapi dalam percubaan-percubaan menyampaikan writ. Untuk menolak perlanjutan dalam kes tersebut akan membenarkan defendan berada diluar bidang kuasa dan mengambil kesempatan terhadap statut had masa- satu ketidakadilan yang ketara kepada plaintif. Disini, defendan tidak berada di dalam bidang kuasa, percubaan-percubaan telah dibuat untuk menyerahkan writ dan defendan telah mengelak penyampaian keatasnya.

(3) Plaintif telah memohon kebenaran melalui saman pemula yang telah didengar di Dagang 7. Plaintif telah memfailkan writ yang mana telah dikeluarkan oleh Dagang 8. Plaintif tidak mempunyai kawalan Mahkamah mana yang telah diperuntukkan bagi tindakan guaman dan writ. Writ, dikeluarkan oleh pendaftaran Mahkamah Tinggi, dan diperuntukkan ke Dagang 8, berdasarkan kepada kebenaran yang diperolehi dari Dagang 7, telah dikeluarkan dengan cara yang betul.

(4) Penyampaian plaintif melalui penyampaian ganti adalah di luar aturan. Perintah untuk menyampaikan di luar bidang kuasa diperolehi daripada Mahkamah Dagang 8 pada bulan Ogos 2002 bila kebenaran telahpun diperolehi daripada Mahkamah Dagang 7 pada bulan Mac 2001. Permohonan plaintif untuk mendapatkan bantuan bagi membolehkan writ disampaikan kepada defendan sememangnya bersandarkan kepada kebenaran yang diberikan oleh Dagang 8, dan melampirkan bersama-samanya salinan termeterai notis writ untuk penyampaian diluar bidang kuasa bertarikh 21 Ogos 2002 dan writ saman yang telah dilanjutkan bertarikh 16 April 2002 yang mana kedua-duanya berdasarkan kepada kebenaran kedua.

(5) 'Arahan' daripada writ yang dikeluarkan dari Mahkamah Tinggi kita tidak akan menjangkau bidang kuasa yang lain. Untuk menyampaikan writ diluar bidangkuasa akan mencabul kedaulatan wilayah tersebut. Justeru itu hanya notis writ dan bukan writ itu sendiri perlu disampaikan kepada defendan diluar bidangkuasa. Tujuan menyampaikan notis writ adalah untuk memberi notis kepadanya bahawa tindakan plaintif terhadapnya adalah dalam bidangkuasa ini. Oleh itu, notis dengan apa cara sekalipun akan dapat dilakukan tertakluk hanya kepada kaedah-kaedah KMT.

(6) Notis writ tidak perlu disampaikan melalui serahan Kediri kepada defendan jika ia disampaikan kepadanya berpandukan kepada undang-undang negara dimana penyampaian itu dibuat. Disini, Plaintif bergantung kepada serahan kediri. Setelah memperolehi kebenaran menyampaikan notis writ, plaintif

tidak perlu lagi mendapatkan perintah daripada mahkamah untuk penyampaian itu dikuatkuasakan. Plaintif hanya perlu mematuhi kaedah-kaedah tempatan berkaitan dengan penyampaian sebagai rujukan kepada penyampaian notis.]

Notes

For cases on extension of writ, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 222.

Legislation referred to

Rules of the High Court 1980 O 6 r 6, O 11 r 5(3), O 62 r 5(1)

JL Foo (PL Hooi with him) (Lee Hishammuddin Allen & Gledhill) for the plaintiff. Gan Siew Guat (Yong & Rakan-Rakan) for the defendant.

Kang Hwee Gee J:

[1] This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar in allowing the defendant's application to set aside the writ of summons allegedly served on him at Projenco Ltd, Clifton House, No 318A Kings Road, Reading RG 4JE, England, United Kingdom on 13 October 2005.

[2] The plaintiff's claim against the defendant is for monies allegedly due from the defendant arising from trading in securities for which the plaintiff acted as the defendant's sharebroker.

[3] On 21 March 2001 the plaintiff filed an application in Dagang 7 Kuala Lumpur High Court for leave to issue and serve proceedings out of jurisdiction against the defendant pursuant to O 6 r 6 and O 11 of the Rules of the High Court 1980 ('the RHC').

[4] On 10 April 2001 leave was granted by Dagang 7 High Court (exh 'A–1' encl 67) which reads as follows:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN DAGANG)
GUAMAN SIVIL NO D7–24–79 TAHUN 2001
ANTARA

SOUTH JOHOR SECURITIES SDN BHD (No Syarikat: 53647–D) … PLAINTIF

DAN

ALEXANDER CODSI (British Passport No 500158602) … DEFENDAN
DI HADAPAN PENOLONG KANAN PENDAFTAR
TUAN K.M. NITHIYAANANTHAM
PADA 10 HARIBULAN APRIL 2001 DALAM KAMAR

PERINTAH UNTUK PENYAMPAIAN DI LUAR BIDANG KUASA

ATAS PERMOHONAN Plaintif yang tersebut di atas melalui Saman Dalam Kamar (Ex-parte) bertarikh 21 Mac 2001 DAN SETELAH MEMBACA Afidavit Lim Kim Heng, yang diikrarkan pada 21hb Mac 2001 dan difailkan di sini DAN SETELAH MENDENGAR Cik Katherine Kohlhoff Durai, peguam bagi pihak Plaintif MAKA ADALAH DIPERINTAHKAN bahawa Plaintif diberi kebenaran untuk mengeluarkan suatu Notis bagi Writ Saman terhadap Defendan dan menyampaikan Notis bagi Writ Saman tersebut kepada Defendan di alamat rumah P. O. Box 2195, Dubai, United Arab Emirates dan/atau di alamat perniagaannya di Projenco Ltd, Clifton House, 318A, Kings Road, Reading, RG 4JE, England DAN ADALAH JUGA DIPERINTAHKAN bahawa waktu untuk memasukkan kehadiran dalam tindakan oleh Defendan ialah sembilan puluh (90) hari selepas penyampaian Notis Writ Saman itu kepada Defendan DAN SELANJUTNYA DIPERINTAHKAN bahawa kos bagi dan yang bersampingan dengan permohonan ini dijadikan kos dalam kausa.

Bertarikh pada 10 haribulan April, 2001.

Sgd
Penolong Kanan Pendaftar Mahkamah Tinggi Kuala Lumpur.

On 16 April 2002 the writ and statement of claim were filed in this court (Dagang 8) under suit No. D8–22–566 of 2002.

On 5th August 2002 another order for leave to issue and serve proceedings against the defendant out of jurisdiction was obtained in this court Dagang 8 (exh 'A–2' encl 67) which read as follows:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN DAGANG)
GUAMAN SIVIL NO. D8-22-566 TAHUN 2002
ANTARA

SOUTH JOHOR SECURITIES SDN BHD (No Syarikat: 53647–D) … PLAINTIF

DAN

ALEXANDER CODSI (British Passport No 500158602) … DEFENDAN
DI HADAPAN PENOLONG KANAN PENDAFTAR

PUAN FAJRUL SHIHAR BT HAJI ABU SAMAH
PADA 5 HARIBULAN OGOS 2002 DALAM KAMAR

PERINTAH UNTUK PENYAMPAIAN DI LUAR BIDANG KUASA

ATAS PERMOHONAN Plaintif yang dinamakan di atas DAN SETELAH MEMBACA Saman Dalam Kamar (Ex-parte) bertarikh 21 haribulan Mei 2002 dan Afidavit Untuk Kebenaran Menyampaikan Writ Di Luar Bidangkuasa Katherine Kohlhoff Durai yang diikrarkan pada 20 haribulan Mei 2002 dan kesemuanya difailkan di sini DAN SETELAH MENDENGAR Cik Katherine Kohlhoff Durai peguam bagi pihak Plaintif MAKA ADALAH DIPERINTAHKAN bahawa Plaintif diberi kebenaran untuk mengeluarkan suatu Notis bagi Writ Saman terhadap Defendan dan menyampaikan Notis bagi Writ Saman tersebut kepada Defendan di alamat kediamannya di P.O.Box 2195, Dubai, United Arab Emirates dan di alamat perniagaannya di alamat Projenco Ltd. Clifton House, 318A, Kings Road, Reading, RG4JE, England DAN ADALAH JUGA DIPERINTAHKAN bahawa waktu untuk memasukkan kehadiran dalam tindakan oleh Defendan ialah sembilan puluh (90) hari selepas penyampaian Notis Writ Saman itu kepada Defendan DAN SELANJUTNYA DIPERINTAHKAN bahawa kos permohonan ini dijadikan kos dalam kausa.

Bertarikh pada 5 haribulan Ogos 2002.

Sgd
Penolong Kanan Pendaftar Mahkamah Tinggi Kuala Lumpur.

Attempts were made by the plaintiff to serve the writ of summons on the defendant personally in England and the United Emirates but in vain.

On 28 October 2004 the plaintiff obtained the first order for substituted service. The plaintiff did not act on this order. This order provides for service to take effect 30 days after the date of advertisement and posting. NB: no action was taken on the order.

[7] On 8 April 2005 the plaintiff obtained a second order for substituted service. This order provides for service to take effect seven days after the date of advertisement and posting.

[8] On 3 April 2006 the plaintiff obtained an order amending the order of 8 April 2005 for substituted service. The purpose of this amendment was to amend the requirement to serve the writ, the statement of claim and the order for substituted service to the requirement to serve the notice of the writ of summons by substituted service. This is to shorten the textual contents of the advertisement.

[9] On 13 October 2005 the notice of the writ and the statement of claim were sent by first class registered post to the defendant (exh 'A–6' encl 67) in compliance with the Civil Procedure Code of England and Wales pursuant to the order obtained by the plaintiff from the Dagang 7 court on 10 April 2001.

[10] On 4 and 5 April 2006 substituted service of the notice of the writ of summons was first executed in Malaysia and the United Kingdom by advertisement and posting on the terms of the amended order dated 3 April 2006.

Submits:

Leave was in fact granted in Dagang 7 Kuala Lumpur High Court by originating summons on 10 April 2001. It is by this very leave that we proceeded to issue and to serve out of jurisdiction. We took out the writ on 16 April 2002 to be served outside the jurisdiction within 6 months.

The leave that we are relying on is the leave that is granted by Dagang 7. The Practice Direction cited by the defendant No 2 of 1982 was issued at that time when there was no division in the Kuala Lumpur High Court. The division just came in on the 1 January 1987 by Practice Direction No 7 of 1986.

In any case Dagang 7 and Dagang 8 are in the same High Court.

Submits:

We had made seven extensions to the writ. This was because numerous attempts to serve the writ and statement of claim by personal sevice were unsuccessful as explained in the affidavit of the plaintiff (encl 67)

Submits:

Defendant had been evading service (see exh 'A–5' encl 67—English solicitor's statutory declaration saying contacted defendant by phone, later defendant did not turn up. Subsequent attempts at personal service but in vain).

Submits:

There is a typographical error with respect to number 566 which was advertised as 556 in the advertisement in the United Kingdom. No prejudice. If court accepts service by post as valid then the numbering error is irrelevant.

Submits:

All the complaints are merely as to the regularity or irregularity of the procedure. The defendant has not on the affidavit substantiated any prejudice he claimed to suffer.

The appeal is opposed by the defendant on the following grounds:

1. The plaintiff did not obtain leave in this court to serve the writ out of jurisdiction contrary to O 6 and O 11.
2. What the plaintiff is relying on now is to show by its latest affidavit dated 18 October 2006 that leave had been obtained a year ago by means of originating summons D7–24–79 of 2001 vide order dated 10 April 2001

3. This leave is supposed to be used to serve a notice of writ of summons on the defendant at the addresses mentioned in Dubai and/or in Reading

4. The leave so granted was in respect of the proposed writ of summons to be issued in the Dagang 7 but no writ was filed in Dagang 7. Instead the writ was filed in Dagang 8. See Practice Direction No 2 of 1982

   Submits: There was never any leave obtained in this court

5. Assuming that the leave obtained was regular, the said writ was never served on the defendant. This writ (exh 'AC–3' encl 57) was never served on the defendant. The defendant had notice of the writ only by way of advertisement dated 5 April 2006 but the writ was under Civil Suit No D8–22–556 of 2002. NB: The number 556. Here the suit number is 566.

6. The plaintiff failed to comply with the order for substituted service obtained on 28 October 2004 wherein the order specifically says that it should be 30 days to be deemed service. In the advertisement it is stated as 7 days deemed service.

   Submits: This is bad.

7. The advertisement also failed to state that the defendant would have 30 days to file in their defence after the memorandum of appearance to be filed in compliance with the leave obtained by the plaintiff.

   Submits: This is bad.

8. The plaintiff thereafter on 8 April 2005 obtained another order for substituted service and extension of time from this court to serve the writ of summons dated 16 April 2002 and statement of claim dated 15 April 2002 pursuant to O 62 r 5(1) and (2) of the Subordinate Courts Act 1980. This order was amended on 3 April 2006 a year after. The amended order obtained now says that a notice of writ of summons is to be served by substituted service.

9. Submits: Amendment is bad as they failed to amend the application itself.

   The writ has been extended wrongly seven times from 2002 to 2006 thereby depriving the defendant from pleading limitation.

10. The amended order of 3 April 2006 is not the same as the original 8 April 2005.

Further reply by counsel for the defendant:

1. Plaintiff has indicated that they were relying on the leave obtained in the Dagang 7 court. However, if that is the case why is that there is no record at all of the Dagang 7 order in this court.

2. Furthermore why then did they need to apply for a second leave order from this court on 5 August 2002.

3. But plaintiff had proceeded on the leave order obtained on 5 August 2002. Contemporary documents showed this – refer to encl 67 exh 'A–4'.

   Submits: that the court's record would show that the plaintiff was relying purely on the leave obtained on 5 August 2002 and there was never any indication that the plaintiff ever relied on the leave obtained in the Dagang 7 court

4. Extension of seven times should not have been granted because as early as October 2003 the court has already informed the plaintiff that they would not oblige the plaintiff for any extension of time due to Order 6 rule 7(2) of the Rules of the High Court 1980. See encl 67 exh 'A–4' pages 32–35.

5. Service by first class post is bad because Rule 6.3 of the Civil Procedure Rules, United Kingdom provides that the court is to serve the document unless it falls within the exception.

Submits: applicable rule service of foreign process rule 6.3(2) of the Civil Procedure Rules. In conclusion submits that they had failed to pass the first hurdle of obtaining leave to commence this proceeding which is to be served out of jurisdiction and if the plaintiff is insistent on saying that the Dagang 7 order is valid we humbly adopt your Lordship's statement that second leave superceded the first leave.

NB:

(1) Court to note when this suit was filed plaintiff had relied on leave obtained in Dagang 7 although subsequently another leave from Dagang 8. This was not used — no explanation given as new counsel has taken over.

(2) Plaintiff used second leave to serve out of jurisdiction. See letter to Federal Court to seek assistance to serve through UK judiciary.

FINDINGS AND DECISION

[11] This appeal will stand or fall on the findings in relation to three crucial issues:

(i) whether the writ ought not to be extended;

(ii) whether the leave to issue and serve the notice writ out of jurisdiction was properly obtained; and

(iii) whether the notice of the writ was properly served on the defendant.

The First Issue: Whether the Writ Ought Not to be Extended.

[12] The issuance of a writ and its subsequent extension is strictly the function of the registrar acting within the power conferred upon him under the law and the RHC.

[13] Where the registrar acted within the law and the RHC in the exercise of his discretion to extend the writ it is incompetent for the defendant to challenge his decision. The defendant may only challenge the legality of its issuance.

[14] The amended O 6 r 7(2) which provides that a writ may be extended twice does not prohibit the registrar from extending the writ more than twice where the justice of the case requires. By the use of the word 'may' it is clear to me that the amendment was intended to provide some restrictions on the registrar's discretion, but not to the extent of fettering him where circumstances justify, to order extensions more than twice. Had it been the object of the Rule to prohibit the extension of a writ more than twice, it would so provide for it in clear and absolute terms.

[15] The defendant was not within jurisdiction and the affidavits supporting the application for extensions clearly show that attempts were being made to serve the writ through the good office of the Federal Court Registry for onward transmission

to the Chancery Department of the High Court in England through Wisma Putra and as for the last (seventh) extention, the affidavit in support had alleged on credible grounds that the defendant had been evading service.

[16] It is true that a writ should not generally be allowed to be extended where to do so would deprive the defendant of the defence of the action being time barred, but it was generally meant to apply to those cases where the plaintiff had sat on his right to commence an action against a defendant who could be served with the writ. It was not meant to fetter the discretion of the Registrar to grant the extension where, as in this case, the defendant was residing outside the jurisdiction and difficulties were encountered in the plaintiff's attempt to serve the notice of the writ and there was evidence that he was evading service. To refuse extension in such a case would allow the defendant to stay out of jurisdiction and take advantage of the statute of limitation to avoid the plaintiff's claim without a trial — an obvious injustice to the plaintiff.

The Second Issue: Whether Leave was Properly Obtained.

[17] Before the plaintiff filed the writ of summons which had to be served out of jurisdiction it had to seek leave to issue the same under O 6 r 6 and O 11 of the RHC and the correct way to begin was to file the originating summons, which it did.

[18] Only after obtaining leave on the originating summons can the plaintiff file the writ as it had done at the High Court registry.

[19] Leave was applied for by originating summons in the Dagang 7 court and the writ was later filed in the Dagang 8 court.

[20] The plaintiff did not have control of which court the originating summons that it had filed would be heard. Nor would it have any control over which court the writ of summons would be allotted to after it was issued.

[21] It is clear that the writ that was issued out of the registry was issued on the strength of the leave obtained at the Dagang 7 court and the suit was later allotted to the Dagang 8 court where it would thereafter reside.

[22] There is therefore nothing irregular on this issue.

The Third Issue: Whether the Notice was Properly Served on the Defendant.

[23] It is pertinent to note right from the start that the 'command' from a writ issued out of our High Court does not extend to other jurisdictions.

[24] To serve the writ on a defendant residing out of jurisdiction would constitute an encroachment on the sovereignty of the country where the defendant resides. Hence the provision in the RHC that only a notice of the writ and not the writ itself should be served on a defendant residing outside the jurisdiction.

[25] Essentially, the objective of serving a notice of the writ or for that matter any notice on a defendant, whether within or without the jurisdiction, is to bring to his notice that the plaintiff has filed an action against him in this jurisdiction and that he is required under the law of this jurisdiction to enter appearance failing which an action may proceed in his absence and judgment entered against him.

[26] A notice may therefore be effected by any means (inclusive of the established methods of personally serving the notice on him, by notice in the newspaper, by post, or for that matter by any other means) by which the specific contents therein can reasonably be communicated to him, subject only to the rules of the RHC.

[27] The RHC has set out under O 11 r 5 how a notice of a writ may be served as follows:

Rule 5. Service of notice of writ abroad: General (O 11 r 5)

(1) Subject to the following provisions of this rule, O 10 r 1, and O 62 r 5, shall apply in relation to the service of a notice of a writ notwithstanding that the notice is to be served out of the jurisdiction.

(2) Nothing in this rule or in any order or direction of the court made by virtue of shall authorize or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country.

(3) A notice of a writ which is to be served out of the jurisdiction need not be served personally on the person required to be served so long as it is served on him in accordance with the law of the country in which service is effected.

(4) Where a certificate under the following provisions of this rule is produced in relation to the service of notice of a writ in accordance with r 6 or r 7, O 10 r 1(4), shall not apply in relation to that service.

(5) An official certificate stating that a notice of a writ as regards which rule 6 has been complied with has been served on a person personally, or in accordance with the law of the country in which service was effected, on a specified date, being a certificate —

(a) by a consular authority in that country; or

(b) by the government or judicial authorities of that country; or

(c) by any other authority designed in respect of that country, under the Hague Convention, shall be evidence of the facts so stated.

(6) An official certificate by the minister stating that notice of a writ has been duly served on a specified date in accordance with a request made under rule 7 shall be evidence of that fact.

(7) A document purporting to be such a certificate as is mentioned in para (5) or (6) shall, until the contrary is proved, be deemed to be such a certificate.

(8) Where the defendant is in Singapore or Brunei, the notice of a writ may be sent by post or otherwise by the registrar to the magistrate, registrar, or other appropriate officer of any court exercising civil jurisdiction in the area in which the person to be served is said to be or to be carrying on business for service on the defendant, and if it is returned with an indorsement of service and with an affidavit of such service, it shall be deemed to have been duly served.

[28] The plaintiff claimed to have effected service of the notice of the writ both by substituted service under O 62 r 5 and by direct service under O 11 r 5(3) wherein the procedure for service of documents by post as provided under the English Civil Procedure Rules ('the CPR') 6.2 was followed.

[29] Having considered the affidavits and heard the submission of the parties, I would have to agree with the submission of the defendant that the plaintiff's service by substituted service was fraught with irregularities in that the order to serve out of jurisdiction was again obtained from the Dagang 8 court on 5 August 2002 when leave had already been obtained from the Dagang 7 court earlier on 21 March 2001. The request by the plaintiff to the authority (in this case the Federal Court Deputy Registrar) by letter dated 8 November 2002 seeking his assistance to communicate with the judicial authorities in England and UAE to have the writ served on the defendant was indeed based on the second leave obtained on 5 August 2002 from the Dagang 8 court, and enclosing therewith sealed copies of notice of writ to be served out of jurisdiction dated 21 August 2002 and the extended writ of summons dated 16 April 2002 both based on the second leave.

[30] But the plaintiff in this case had not only applied to serve the notice of the writ by substituted service it had also relied on direct service under O 11 r 5(3) read with the English CPR 6.2.

[31] Order 11 r 5(3) made it clear that a notice of the writ need not be served by personal service on the defendant provided it is served on him in accordance with the law of the country in which service is effected.

[32] A plaintiff intending to serve a notice under O 11 r 5(3) need not therefore obtain any further order from the court after having been granted leave to serve the notice of the writ. To be effective all that the plaintiff is required to do is to comply with the English CPR 6.2 with respect to the service of a notice which read as follows:

I. GENERAL RULES ABOUT SERVICE

6.2 Methods of service — general

(1) A document may be served by any of the following methods —

(a) personal service, in accordance with rule 6.4;

(b) first class post (or an alternative service which provides for delivery on the next working day);

(c) leaving the document at a place specified in rule 6.5;

(d) through a document exchange in accordance with the relevant practice direction; or

(e) by fax or other means of electronic communication in accordance with the relevant practice direction.

(Rule 6.8 provides for the court to permit service by an alternative method)

A (2) A company may be served by any method permitted under this part as an alternative to the methods of service set out in —

(a) section 725 of the Companies Act 1985 (service by leaving a document at or posting it to an authorised place);

(b) section 695 of that Act (service on overseas companies); and

B (c) section 694A of that Act (service of documents on companies incorporated outside the UK and Gibraltar and having a branch in Great Britain).

C **[33]** The notice of the writ in Form 11 that was sent to the defendant by the plaintiff under O 11 r 5(3) constitutes in its own right a notice notifying the defendant that the plaintiff had begun an action against him in the High Court Malaya and requiring him to enter appearance failing which judgment may be entered against him.

D **[34]** It is clear that the plaintiff by serving the notice of the writ on the defendant under English CPR 6.2 had complied with O 11 r 5(3) of our RHC. The service therefore constitues a good service of the notice of the writ.

[35] The appeal is allowed with costs. Enclosure 65 is an application by the defendant to set aside the order of 5 August 2002 which is the second leave granted E by this court. This should be heard by the registrar.

Appeal allowed with costs.

Reported by Sivapragasam Kumaran

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